

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JORGE AQUINO,)	
)	CASE NO. C11-6031-RSM-MAT
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
MICHAEL J. ASTRUE, Commissioner of)	
Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Jorge Aquino appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied his application for Supplemental Security Income (“SSI”) under Title XIV of the Social Security Act, 42 U.S.C. §§ 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED for further administrative proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1962 and was 47 years old on the amended alleged disability onset date. (Administrative Record (“AR”) at 34, 148.) He has less than a high school education

01 and previously worked as a crab/fish butcher. (AR 38, 49, 586, 171-72.) Plaintiff served ten
02 years in prison and was released in 2009. (AR 259.) On October 29, 2009, he filed an
03 application for SSI, alleging disability beginning on March 1, 2001. (AR 148-50.)

04 Plaintiff's application was denied initially and on reconsideration. (AR 17.) Plaintiff
05 requested a hearing, which took place on June 30, 2011. (AR 31-55.) On July 25, 2011, the
06 ALJ issued a decision finding plaintiff not disabled. (AR 17-25.) Plaintiff's administrative
07 appeal of the ALJ's decision was denied by the Appeals Council (AR 1-3), making the ALJ's
08 ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g).
09 On December 17, 2011, plaintiff timely filed the present action challenging the Commissioner's
10 decision. (Dkt. No. 1.)

11 II. JURISDICTION

12 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
13 405(g) and 1383(c)(3).

14 III. DISCUSSION

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, it must be
17 determined whether the claimant has engaged in substantial gainful activity. The ALJ found
18 plaintiff had not engaged in substantial gainful activity since October 29, 2009, his amended
19 alleged disability onset date. (AR 19.) At step two, it must be determined whether the
20 claimant suffers from a severe impairment. The ALJ found plaintiff had the following severe
21 impairments: radial nerve neuropathy and palsy of the right arm, generalized anxiety disorder,
22 depressive disorder, and personality disorder. *Id.* Step three asks whether the claimant's

01 impairments meet or equal the criteria of a listed impairment. The ALJ found that plaintiff's
02 impairments did not meet or equal a listed impairment. (AR 20.) If the claimant's
03 impairments do not meet or equal a listing, the Commissioner must assess residual functional
04 capacity ("RFC") and determine at step four whether the claimant has demonstrated an inability
05 to perform past relevant work. The ALJ found plaintiff could perform less than the full range
06 of light work. (AR 21.) With his right hand, he could lift objects weighing no more than a
07 dish and he could not turn his wrist with this much weight. *Id.* In addition, plaintiff was
08 limited to routine, repetitive work with no public contact and should not be around children
09 unsupervised. *Id.* With that assessment, the ALJ found plaintiff was unable to perform his
10 past work. (AR 24.)

11 If the claimant is able to perform his past relevant work, he is not disabled; if the
12 opposite is true, then the burden shifts to the Commissioner at step five to show that the
13 claimant can perform other work that exists in significant numbers in the national economy,
14 taking into consideration the claimant's RFC, age, education, and work experience. Based on
15 the testimony of the vocational expert, the ALJ found plaintiff retained the ability to perform
16 work that exists in significant numbers in the national economy such as an egg sorter/candler
17 and, therefore, was not disabled. (AR 24-25.)

18 Plaintiff argues that the ALJ erred in evaluating the opinions of state agency medical
19 consultant Robert Hoskins, M.D., and examining psychologist Norma Brown, Ph.D.;
20 evaluating the lay witness testimony; and relying on the vocational expert's testimony at step
21 five. He requests remand for further proceedings. The Commissioner argues that the ALJ's
22 decision is supported by substantial evidence, is free of legal error, and should be affirmed.

01 A. Medical Opinion Evidence

02 In general, more weight should be given to the opinion of a treating physician than to a
03 non-treating physician, and more weight to the opinion of an examining physician than to a
04 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where not
05 contradicted by another physician, a treating or examining physician's opinion may be rejected
06 only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,
07 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may
08 not be rejected without "specific and legitimate reasons" supported by substantial evidence in
09 the record for so doing." *Id.* (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

10 The ALJ may reject physicians' opinions "by setting out a detailed and thorough
11 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
12 making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). Rather than merely
13 stating his conclusions, the ALJ "must set forth his own interpretations and explain why they,
14 rather than the doctors', are correct." *Id.*

15 1. *Robert Hoskins, M.D.*

16 On December 28, 2009, a state agency "single decisionmaker" completed a physical
17 residual functional capacity assessment. (AR 631-38.) He found plaintiff could lift twenty
18 pounds frequently and ten pounds occasionally, but could never push, pull, handle, or finger
19 with his right upper extremity. (AR 632, 634.) On April 1, 2010, Dr. Hoskins adopted the
20 RFC assessment, but added that "claimant, though a quasi partially one-armed worker, can still
21 perform light-level work parameters." (AR 651.)

22 The ALJ found plaintiff "can lift objects weighing no more than a dish and he cannot

01 turn his wrist with this much weight,” but placed no limitations on the amount of pushing,
02 pulling, handling or fingering he could perform with his right hand. (AR 21.) Plaintiff argues
03 that the ALJ’s RFC assessment is inconsistent with Dr. Hoskins’s opinion. He contends that
04 the ALJ erred when he reached a conclusion inconsistent with Dr. Hoskins’s opinion but failed
05 to give any reason for rejecting it.

06 The Commissioner contends that because the RFC and the hypothetical question
07 presented to the vocational expert (“VE”) included all of the physical limitations assessed by
08 Dr. Hoskins, the ALJ did not need to specifically address his opinion. In the hypothetical to
09 the VE, the ALJ stated,

10 And his most significant physical problem is his right hand and wrist. It sounds
11 like he can pick up only with his, his thumb and index finger, and he can lift up
12 something as heavy as a dish with that, but can’t manipulate it. He can’t turn his
13 wrist and flex his wrist while he’s got that in his hand. So he can pick it up, but
that’s the extent of what he can do, something about the weight of a dish, and that’s
probably the extent of the use of his right hand. He can use it as a block or
something, but he can’t manipulate items with it and he’s right-handed.

14 (AR 49.) In response, the VE testified that plaintiff could perform the job of egg candler, and
15 affirmed that this was a job plaintiff “could basically do one-handed.” (AR 50.) The
16 Commissioner argues that the ALJ did not need to include limitations to pushing, pulling,
17 handling, or fingering because the ALJ described an individual with practically no use of his
18 right hand and including those limitations would have been redundant. The Court agrees with
19 the Commissioner.

20 Although the RFC did not include all of the physical limitations assessed by Dr.
21 Hoskins, the hypothetical to the VE was more limited than the RFC and described an individual
22 with essentially no use of his right hand. Further, the VE testified that a person could perform

the job of egg candler one-handed. Because the VE's job finding incorporated all of the limitations assessed by Dr. Hoskins, the ALJ's error in failing to include these limitations in the RFC assessment was harmless. *See Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (recognizing application of harmless error in Social Security context where a "mistake was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion.").

2. *Norman Brown, Ph.D.*

Dr. Brown completed two psychological evaluations for the Washington State Department of Social and Health Services ("DSHS"). (AR 586-603, 671-84.) She diagnosed plaintiff with generalized anxiety disorder; major depressive disorder, recurrent, moderate; and maladaptive behavior characteristic of antisocial personality disorder. (AR 588, 673.) She assigned him a global assessment of functioning ("GAF")¹ score of 49, indicating serious symptoms or a serious impairment in social, occupational, or school functioning. DSM-IV-TR at 34. Dr. Brown opined that plaintiff would have "marked" limitations in his ability to relate appropriately to co-workers and supervisors (noting he can be irritable and confrontive when pushed by authority figures), to interact appropriately in public contacts (noting he is socially avoidant), to respond appropriately to and tolerate the pressures and expectations of a normal work setting (noting he has few coping skills to deal with stress), and to maintain appropriate behavior in a work setting (noting he is easily frustrated with others and has low tolerance for

¹ The GAF score is a subjective determination based on a scale of 1 to 100 of "the clinician's judgment of the individual's overall level of functioning." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (Text. Rev., 4th ed. 2000) ("DSM-IV-TR").

01 conflictual encounters). (AR 589, 674.)

02 The ALJ gave “limited weight” to Dr. Brown’s opinion that plaintiff had marked
03 functional limitations, finding these limits “inconsistent with the claimant’s own testimony
04 about his functioning.” (AR 23.) Although the ALJ agreed that plaintiff had significant
05 difficulties interacting with the public, the ALJ found plaintiff’s “successful work as a
06 dishwasher and interaction with his supervisor there and with guards while incarcerated belie
07 Dr. Brown’s rating regarding the claimant’s social interactions (apart from interactions with the
08 public), his ability to deal with normal stress of a work setting, and his ability to maintain
09 appropriate behavior in some settings.” *Id.*

10 The ALJ pointed out that plaintiff successfully performed work as a dishwasher at the
11 Coffee Club Diner during an Easter Seals Community Based Assessment (“CBA”) in February
12 2011. (AR 23, 53, 244-46.) In a three-page letter, an Easter Seals employment specialist
13 reported that plaintiff was “very successful” in pace and production during the very busy lunch
14 time; showed no frustration, stress, or emotional instability; smiled regularly throughout his
15 shift; and was observed laughing and joking with other staff while on breaks. *Id.* In addition,
16 the ALJ noted that plaintiff denied having any problems getting along with supervisors while on
17 the job or with the prison guards while he was incarcerated. (AR 23, 53.) When asked at the
18 hearing whether he could perform the job of egg candler described by the vocational expert,
19 plaintiff testified, “I could probably tolerate that.” (AR 52.)

20 Plaintiff argues that his performance as a dishwasher during the CBA was not a valid
21 reason for rejecting Dr. Brown’s opinion because the work was done under “special
22

01 conditions,” citing 20 C.F.R. § 416.973(c).² Plaintiff asserts that he was only assessed for 18
02 hours (three weeks, two days a week, three hours a day), he had a job coach with him the entire
03 time, and the job was slow paced and easy going. AR 244-46.

04 Although a claimant’s work may not show the ability to engage in substantial gainful
05 activity if it is performed under special conditions, “work done under special conditions may
06 show that [a claimant has] the necessary skills and ability to work at the substantial gainful
07 activity level.” 20 C.F.R. § 416.973(c). Here, the ALJ did not find that plaintiff had engaged
08 in substantial gainful activity at step one. Rather, the ALJ found that plaintiff’s successful
09 work as a dishwasher, though temporary, was inconsistent with Dr. Brown’s opinion that
10 plaintiff had marked limitations in his ability to deal with normal stress of a work setting, and
11 his ability to maintain appropriate behavior in some settings. (AR 23.) The ALJ may reject a
12 medical opinion that is inconsistent with other evidence of record, such as a claimant’s
13 activities. *See Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999).
14 The ALJ properly found plaintiff’s work as a dishwasher showed he had the capacity to relate
15 appropriately to coworkers and supervisors, deal with normal stress, and maintain appropriate
16 behavior, inconsistent with Dr. Brown’s opinion.

17 Plaintiff further argues that the ALJ erred in relying on a portion of the employment

18
19 2 The regulations provide that “[i]f your work is done under special conditions, we may
20 find that it does not show that you have the ability to do substantial gainful activity.” 20 C.F.R.
21 §§ 404.1573(c), 416.973(c). Examples of special conditions include: requiring or receiving
22 special assistance from other employees in performing work; working irregular hours or
taking frequent rest periods; getting special equipment or being assigned work especially suited
to the claimant’s impairment; working only because of specially arranged circumstances;
working at a lower standard of productivity or efficiency than other employees; or working,
despite an impairment, because of a family relationship, association with an employer, or an
employer’s concern. *Id.*

01 specialist's letter which stated that, "*Matthew* showed no frustration, no stress and no emotional
02 instability. *Matthew* was in a good mood and smiled regularly throughout his shift. I
03 observed *James* laughing and joking with other staff while on breaks." (AR 245 (emphasis
04 added).) Plaintiff contends that because this portion of the letter does not refer to him, the ALJ
05 erred when he relied on the statement that plaintiff smiled regularly and was observed laughing
06 and joking. (Dkt. No. 16 at 5.) The Court agrees with the Commissioner that the
07 misdesignation is no more than a typographical or transcription error and does not negate the
08 entire report. The employment specialist clearly wrote the letter about plaintiff, repeatedly
09 referencing plaintiff by name. (AR 244-46.) Furthermore, the employment specialist
10 specifically indicated that plaintiff was able to perform work in the community despite his
11 mental impairments, stating,

12 In closing, Jorge did very well during this CBA. He showed he possesses the
13 skills that would enable him to become hireable in the community. He seemed to
14 become very comfortable in the environment he worked in. On day one he
15 seemed a bit reclusive, but opened up very quickly. He did comment that crowds
may be an issue, but this was not seen by either me or the other staff. Jorge has the
capability to become a productive and valued employee at any establishment when
he feels comfortable and understands how to perform the tasks he is assigned.

16 (AR 246.) Even without the misdesignated portion of the letter, the ALJ did not err in finding
17 plaintiff's successful work as a dishwasher was inconsistent with Dr. Brown's opinion.

18 Plaintiff also disputes the ALJ's finding that Dr. Brown's opinion is inconsistent with
19 plaintiff's testimony of his functioning, arguing that his testimony supports the limitations in
20 pressures and expectations attributed to him by Dr. Brown. Plaintiff asserts that he testified
21 that the job as dishwasher was slow paced and easy going, and that if the job had been busy, he
22 would have struggled a little. (AR 42.) He also testified, "[j]ust the fact that it would be a lot

01 of hand/eye coordination and try to hurry things, it would probably slow me down just a bit.”

02 *Id.*

03 Although plaintiff testified that his dishwashing job was slow and easy, he said that he
04 performed well and received a great report. (AR 22, 40.) Plaintiff also indicated that he had
05 no problems interacting with supervisors or with the prison guards while incarcerated. (AR 22,
06 53.) In addition, plaintiff testified that he did not see any problem doing jobs such as the egg
07 candler described by the vocational expert. (AR 23, 52.) Substantial evidence supports the
08 ALJ’s finding that Dr. Brown’s opinion that plaintiff had marked functional limitations was
09 inconsistent with plaintiff’s own testimony of his functioning. As the Commissioner argues,
10 plaintiff merely presents an alternative interpretation of the evidence. However, when the
11 evidence is susceptible to more than one rational interpretation, it is the Commissioner’s
12 conclusion that must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).
13 While it is possible to construe the evidence as urged by plaintiff, it is not possible to conclude
14 that his interpretation is the only rational interpretation. The ALJ did not err in finding Dr.
15 Brown’s opinion inconsistent with plaintiff’s testimony.

16 Plaintiff also contends that Dr. Brown’s testimony is consistent with other evidence in
17 the record, such as the treatment notes from Kitsap Mental Health Services. It is difficult to see
18 plaintiff’s argument as anything more than a request to reweigh the evidence and to give greater
19 weight to the findings plaintiff believes support his claim of disability. However, it is not the
20 function of this Court to consider whether there is substantial evidence to support his theory of
21 the case, but, rather, whether substantial evidence supports the ALJ’s findings. *Flaten v. Sec’y*
22 *of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). The ALJ gave specific,

01 legitimate reasons supported by substantial evidence for rejecting Dr. Brown's opinions.
02 Accordingly, this claim does not warrant reversal.

03 B. Lay Witness Testimony

04 Plaintiff argues the ALJ did not provide any germane reasons for rejecting the lay
05 testimony of his sister, Sandra Aquino. In order to determine whether a claimant is disabled,
06 an ALJ may consider lay witness sources, such as testimony by parents, siblings, and friends.
07 See 20 C.F.R. §§ 404.1513(d), 416.913(d). Lay witness testimony as to a claimant's
08 symptoms or how an impairment affects ability to work is competent evidence that cannot be
09 disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). To
10 discount lay witness testimony, the ALJ must "provide reasons germane to each witness." *Id.*

11 Ms. Aquino, completed a third-party function report in March 2009, while plaintiff was
12 incarcerated. (AR 178-85.) She indicated that plaintiff's conditions affect his ability to lift,
13 squat, reach, kneel, talk, remember, complete tasks, concentrate, understand, follow
14 instructions, use his hands, and get along with others. (AR 183.) She stated, "Lifting is only
15 2-3 lb, doesn't reach with right arm, kneeling can't get up, talking very [sic] to understand,
16 memory not good, tasks can't finish, no concentration, understand not following instructions,
17 needs help using hand . . . hard to talk to others." *Id.* Ms. Aquino also noted that plaintiff
18 does not like to socialize, stresses out easily and has anxiety, but gets along with authority
19 figures. (AR 183-84.)

20 The ALJ assigned limited weight to this report, stating that plaintiff's "daily activities
21 are inconsistent with the alleged limitations." (AR 22.) The Commissioner argues that
22 inconsistency between a claimant's daily activities and a lay witness's statement is a germane

01 reason to discredit the lay witness. *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155,
02 1163-64 (9th Cir. 2008). However, the ALJ did not identify any inconsistencies.

03 The ALJ noted that “Ms. Aquino reported that, although limited by his incarceration,
04 the claimant prepared simple meals for himself. He did his own laundry. With her help for
05 transportation, the claimant did grocery shopping twice a week and attended doctor
06 appointments. His sister reported that the claimant got along well with authority figures.”
07 (AR 22.) It is unclear how the limitations Ms. Aquino alleged are inconsistent with the daily
08 activities she described plaintiff as doing. On remand, the ALJ must reexamine Ms. Aquino’s
09 report and provide germane reasons if he wants to reject her testimony again. *Stout*, 454 F.3d
10 at 1056 (holding “where the ALJ’s error lies in a failure to properly discuss competent lay
11 testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless
12 it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could
13 have reached a different disability determination.”).

14 C. Step Five

15 At step five, the burden of production shifts to the Commissioner to show that the
16 claimant can perform other work that exists in significant numbers in the national economy,
17 given the claimant’s age, education, work experience, and RFC. *Tackett v. Apfel*, 180 F.3d
18 1094, 1100-01 (9th Cir. 1999). The Commissioner may meet this burden by referring to the
19 Medical-Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2, or by eliciting the
20 testimony of a vocational expert (“VE”). *Id.* at 1101. In order for the VE’s testimony to
21 constitute substantial evidence, the ALJ must pose a hypothetical “that reflects all the
22 claimant’s limitations.” *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir.1995). The ALJ’s

01 depiction of the claimant's impairments must be "accurate, detailed, and supported by the
02 medical record." *Tackett*, 180 F.3d at 1101.

03 Pursuant to Social Security Ruling ("SSR") 00-4p, an ALJ has an affirmative
04 responsibility to ask whether a VE's testimony conflicts with Dictionary of Occupational Titles
05 (4th ed. 1991) ("DOT"), and, if there is a conflict, whether there is a reasonable explanation for
06 such conflict. *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007) ("[W]e address the
07 question whether, in light of the requirements of SSR 00-4p, and ALJ may rely on a vocational
08 expert's testimony regarding the requirements of a particular job without first inquiring whether
09 the testimony conflicts with the Dictionary of Occupational Titles. We hold than an ALJ may
10 not."). As stated by the Ninth Circuit, "[A]n ALJ may rely on expert testimony which
11 contradicts the DOT, but only insofar as the record contains persuasive evidence to support the
12 deviation." *Id.* at 1153 (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995)); *see*
13 *also Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) ("We merely hold that in order for
14 an ALJ to rely on a description in the [DOT] that fails to comport with a claimant's noted
15 limitations, the ALJ must definitively explain this deviation.").

16 At the hearing, the ALJ asked the VE whether an individual with plaintiff's age,
17 education, work experience, and RFC could perform any unskilled work. (AR 49-50.) In
18 response, the VE testified that the individual could perform the job of egg candler (DOT
19 529.687-074) with 37,500 jobs in the national economy and 4,800 jobs in the State of
20 Washington. (AR 50.) An egg candler:

21 Inspects eggs to ascertain quality and fitness for consumption or incubation,
22 according to prescribed standards: Observes eggs moving on conveyor over light,
or holds eggs before shielded light or rolls them over lighted glass plate to render

01 egg translucent. Observes shell color and texture, and internal characteristics,
02 such as streaks, shadings, discolorations, size and position of yolk, and size of air
03 cell. Places spoiled and substandard eggs in cases. Packs salable eggs in cartons
04 or releases them on conveyor belt for packing by other workers. May break
substandard eggs in container for further processing. May grade eggs according to
size, shape, color, and weight and be designated Egg Grader (any industry).

05 DOT 529.687-074. The VE further testified that the job of egg candler could be performed
06 with only one hand. (AR 51.)

07 After the hearing, the ALJ allowed plaintiff to submit additional evidence regarding the
08 VE's testimony. (AR 25, 266-88.) The evidence included a letter from plaintiff's attorney
09 and the following attachments: (1) an email and job description from Wilcox Farms; (2) an
10 email from Willamette Egg Farms; (3) a job description from Job Browser Pro; and (4) the job
11 search results with keyword "egg" from Washington State Employment Security Division
12 Worksource. (AR 266-90.) The ALJ considered this evidence but found the VE's testimony
13 from the hearing "more persuasive," noting that the VE was available for cross examination, the
14 VE was a qualified expert who had a good foundation for his opinion, and his testimony was
15 consistent with the DOT. (AR 25.) Although the ALJ stated that the VE's testimony was
16 consistent with the information contained in the DOT, plaintiff accurately observes that the ALJ
17 failed to affirmatively ask the VE whether his testimony conflicted with the DOT.

18 Plaintiff argues that the ALJ's decision is not supported by substantial evidence because
19 the VE's testimony that plaintiff could perform the job of egg candler with only one hand is in
20 conflict with the description of the job in the DOT. Plaintiff asserts the DOT indicates
21 working as an egg candler requires reaching, handling, and fingering, and average manual
22 dexterity, which he can only perform with one hand. He contends that evidence submitted

01 after the hearing from experts in the egg farm industry further bolsters his assertion that egg
02 candling requires use of both hands, and that an individual with limited use of his right arm
03 would not be able to perform the job.

04 The Commissioner contends that the ALJ's failure to affirmatively ask the VE whether
05 his testimony conflicted with the DOT can be deemed harmless because plaintiff has not
06 demonstrated any actual conflict with the DOT. *Rushing v. Astrue*, 360 Fed. Appx. 781, 2009
07 WL 5033730 (9th Cir. 2012) (holding failure to ask VE about consistency with DOT harmless
08 where plaintiff did not allege the VE's testimony was actually inconsistent with the DOT).
09 The Commissioner asserts that although the DOT provides that reaching, handling, fingering,
10 and feeling may be required two-thirds of the time, it does not state that the job requires the use
11 of both hands. Further, even if there was a conflict, the VE specifically testified that the job
12 could be performed with only one hand.

13 While the Commissioner is correct that the DOT does not explicitly state that the job of
14 egg candler requires the use of both hands, the DOT does indicate that an egg candler packs
15 eggs in cartons and may break substandard eggs in container, which generally requires the use
16 of both hands. Furthermore, the ALJ specifically allowed plaintiff to submit additional
17 evidence after the administrative hearing which indicates that egg candling requires good use of
18 both hands. (AR 266-67, 271-74.) This evidence calls into question the VE's testimony that
19 egg candling can be performed with only one hand. Thus, the ALJ erred by relying on the
20 VE's testimony, without more, as a basis for deviating from the DOT.

21 Even if the ALJ did not err by relying on the VE's testimony to deviate from the DOT,
22 the ALJ erred by failing to acknowledge the conflict and explaining how he resolved it in his

01 decision. An ALJ may rely upon a VE's testimony provided that the record reflects an
 02 adequate basis for doing so. *See Massachi*, 486 F.3d at 1153. The ALJ's written decision
 03 inaccurately provides that the VE's testimony was consistent with the DOT, and includes no
 04 further discussion. (AR 25.) As a result, the Court cannot determine whether substantial
 05 evidence supports the ALJ's step five finding that plaintiff could perform other work. *See id.*
 06 at 1153-54. This was reversible error. Accordingly, remand is appropriate to allow the ALJ
 07 to reevaluate what jobs, if any, plaintiff can perform. On remand, the ALJ shall solicit the
 08 testimony of a VE. If there is any conflict between the VE's testimony and the DOT, the ALJ
 09 shall discuss the conflict and the ALJ's resolution of it in the written decision.³

10 IV. CONCLUSION

11 For the foregoing reasons, the Court recommends that the Commissioner's decision be
 12 REVERSED and REMANDED for further administrative proceedings not inconsistent with the
 13 Court's instructions. A propose order accompanies this Report and Recommendation.

14 DATED this 9th day of July, 2012.



15
 16 Mary Alice Theiler
 17 United States Magistrate Judge
 18
 19

20 ³ Because the Court finds that the ALJ erred in finding plaintiff could perform work as
 21 an egg candler, the Court does not address plaintiff's contention that the ALJ erred in finding
 22 there were a "significant number" of egg candler jobs in the national and regional economy.
 On remand, plaintiff may raise the apparent conflict between the VE's testimony and the DOT
 at the hearing.